BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DOUGLAS A. PECK	)	
Claimant	)	
VS.	)	
	)	Docket No. 225,064
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 30, 1998, Award of Assistant Director Brad E. Avery wherein claimant was granted benefits for an injury occurring on December 23, 1996, arising out of and in the course of claimant's employment with respondent.

APPEARANCES

Claimant appeared by his attorney, Gary L. Jordan of Ottawa, Kansas. Respondent and the State Self-Insurance Fund appeared by and through their attorney, Robert E. North of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment on the date alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire record, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

The facts in this matter are not significantly in dispute. On December 23, 1996, claimant exited his house with the intent of cleaning ice off of the windshield of his highway patrol car, which was parked in his driveway. Between claimant's porch and the highway patrol car, claimant slipped on ice, fell and injured his right shoulder. The parties have stipulated to a 21 percent permanent partial impairment to the shoulder for the purpose of this award.

The record is uncontradicted that it was claimant's obligation to maintain his vehicle. This included cleaning any ice off the windshield of the car prior to claimant going "10-8" or on duty. There is, however, a slight dispute regarding claimant's specific location at the time of the fall. Respondent describes the fall as having occurred as claimant exited his porch. Claimant, on the other hand, describes the fall as when claimant took the final step down to the driveway next to the highway patrol car. Fortunately, a photograph of claimant's residence was placed into the record. Claimant's porch runs parallel to his house, with the porch and claimant's garage door ending at approximately the same location. From the garage door, the driveway continues to the street. From the edge of the porch, a concrete landing approximately six inches higher than the driveway continues parallel to the driveway for several feet. It was apparently on this concrete landing that claimant suffered the fall. The record is not clear whether it occurred as claimant was exiting the porch onto the landing or as claimant was exiting the landing onto the driveway. However, it is clear that claimant had not yet reached the patrol car at the time he fell. It is also clear from the record that claimant's sole intent and purpose on that morning was to proceed to the patrol car and clean the ice off the windshield, and warm the car up in order that it would be ready at the time he went "10-8".

Conclusions of Law

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish the claimant's right to an award of compensation by proving the

various conditions upon which claimant's right depends by a preponderance of the credible evidence. *See* K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g).

In order for a claimant to collect workers compensation benefits under the Kansas Workers Compensation Act, he must suffer an injury arising out of and in the course of his employment. K.S.A. 1996 Supp. 44-501. The phrase "out of" the employment points to the cause or the origin of the accident, and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of employment" relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the worker was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

The uncontradicted evidence in this case is that claimant suffered accidental injury as he proceeded from his house to his car. Claimant had not yet arrived at the car, and was not in the process of cleaning or maintaining his vehicle at the time the fall occurred.

The Appeals Board must, as a result, consider the general rule, which disallows compensation for injuries which occur on the way to or from work, as not compensable under the "going and coming" rule.

K.S.A. 1996 Supp. 44-508(f) provides:

> The words "arising out of and in the course of employment" as used in the workers compensation act **shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment** or after leaving such duties, the proximate cause of which injury is not the employer's negligence. (Emphasis added.)

Claimant argues the special hazard exception to the statute applies to these circumstances. K.S.A. 1996 Supp. 44-508(f) establishes a special hazard exception to the "going and coming" rule which contains three elements:

1. The worker must be on the only available road to or from work;

2. The route must involve a special risk or hazard;

3. The route must be one not used by the public except in dealings with the employer.

In this instance, the Appeals Board finds that the ice on the step was not a special risk or hazard. In this instance, the ice on the step was a general risk encountered by all members of the Emporia population at the time of this storm. In addition, the route being used by claimant was not one used by the public exclusively in dealing with the employer, but was instead a private route used by claimant, his family and any persons visiting claimant's residence. Therefore, under the special hazard exception to the "going and coming" rule, claimant fails to prove the elements required to make this injury compensable.

Claimant also argues that a traveling exception must apply in this instance, citing Brobst v. Brighton Place North, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997). The Appeals Board finds claimant's reliance on the logic of Brobst is misplaced. In Brobst, claimant was injured while exiting a seminar and walking to her car. In Brobst, claimant was already at work at the time of the injury and was in the process of leaving a seminar necessitated by her employment. In this instance, claimant was not working at the time of the slip and fall, but was merely proceeding to the car in order to clean the windshield. Had claimant been on duty and, while exiting his patrol car, slipped and fell on the ice, claimant's argument in favor of compensability would be much stronger.

Claimant also cites Kinder v. Murray & Sons Construction Co., Inc., Docket No. 76,296 (Kan. 1998),[1] which states that the workers compensation statutes are to be liberally construed to effect the legislative intent, and award compensation to a worker where it is reasonably possible to do so. While the Appeals Board is mindful of this Supreme Court decision, the Appeals Board must also follow the mandate of the legislature in K.S.A. 1996 Supp. 44-501(g) which states in part "[t]he provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder."

The Appeals Board finds the language of Kinder, which allows for an award of compensation where it is "reasonably possible to do so", does not modify the legislative mandate to apply impartially the Workers Compensation Act to both employers and employees.

Having reviewed the evidence in question, the Appeals Board finds that claimant, at the time of the accident, was on his way to assume the duties of a highway patrolman but had not yet begun his employment responsibilities at his highway patrol vehicle. In

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[1] Kinder v. Murray & Sons Construction Co., Inc., 264 Kan. 484, 957 P.2d 488 (1998)

doing so, claimant's injury must be ruled as noncompensable pursuant to K.S.A. 1996 Supp. 44-508(f), and the Award of the Administrative Law Judge is herein reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Assistant Director Brad E. Avery dated June 30, 1998, should be, and is hereby, reversed, and the claimant is denied benefits for the injury suffered on December 23, 1996, having failed to prove that his accidental injury arose out of and in the course of his employment.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's holding and would affirm the Assistant Director.

The Workers Compensation Act is to be liberally construed to bring both employers and employees within its provisions.[1] In Kinder,[2] the Kansas Supreme Court expanded that directive to hold that workers compensation statutes are to be liberally construed to

[1] K.S.A. 1996 Supp. 44-501(g)

[2] Kinder v. Murray & Sons Construction Co., Inc., 264 Kan. 484, 957 P.2d 488 (1998)

effect legislative intent and award compensation to a worker where it is reasonably possible to do so.

The Assistant Director properly concluded that claimant's job obligated him to keep and maintain his patrol car at home, and that the accident occurred while claimant was performing that task. Therefore, the accident arose out of and in the course of claimant's employment.

BOARD MEMBER

c: Gary L. Jordan, Ottawa, KS
Robert E. North, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director